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EXAMINER

WANG, SHENGJUN

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1617

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/930,320
Filing Date: August 15, 2001
Appellant(s): SHANA'A ET AL.

Alan A. Bornstein
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed May 9, 2006 appealing from the Office action mailed January 10, 2006.

(1) (1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The amendemnts filed October 25, 2005 have been entered. Not after final amendments has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

US Patent 5,972,322	Rath et al.	October 26, 1999
US Patent 5,622,692	Rigg et al.	April 22, 1997
WO 98/30189	Stewart	July 16, 1998
US Patent 4,851,062	Tartaglione	July 25, 1989

(9) Grounds of Rejection

Claim Rejections 35 U.S.C. 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-5, 7-11, 13-19, 22, and 25-29 rejected under 35 U.S.C. 103(a) as being unpatentable over Rath et al. (US 5,972,322, of record), in view of Stewart (WO98/30189, of record).

Rath teaches that hair care products are available as prepared formulations. "A drawback of such products is that the user cannot alter the formulation to accommodate their particular hair characteristics or to provide specialized treatment." Col. 1, lines 11-14. Rath "provide[s] a system which enables a user to formulate a variety of shampoos, hair conditioners or styling compositions to best suit the hair care needs of the user." Col. 1, lines 22-25.

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More specifically, Rath discloses “a system for formulating customized hair care products, such as hair shampoo, conditioner, and styling compositions. The hair care system is composed of separately packaged components, including a low-viscosity aqueous base composition, a compatible thickening composition and, optionally, one or more enhancing additives.” Col. 2, lines 48-54.

“Examples of suitable enhancing additives include a shine enhancer, oil-based moisturizer, herbal additive, hair strengthener, vitamin additive, colorant, body building and conditioning polymers, natural or synthetic fragrance oils (aroma), UV absorbers, and dandruff control compounds.” Col. 9, lines 30-35. Rath teaches exemplary compositions for a “stimulating or astringent herbal additive” and a “soothing herbal additive” (columns 19-20), both compositions have vehicles with at least two ingredients in common. Rath also teaches exemplary color concentrate compositions (columns 20 through 23), all of the compositions have vehicles with at least two ingredients in Common.

Rath teaches that the base, thickener, and additive components are provided separately, together with instructions (col. 13, lines 31-35). “The instructions can provide one or more formulations of the components, including combinations of the base with the thickener and desired enhancing additives, to achieve a desired shampoo, conditioner or styling composition.” Col. 13, lines 36-40. “(T)he base . . . is combined with the desired enhancing additives. The ingredients are typically mixed together by vigorous shaking. . . . A predetermined amount of thickener is then added to the low viscosity mixture, (and) the mixture is vigorously shaken to provide a homogeneous mixture.” Col. 13, lines 53-60.

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For a composition containing a solvent, a solubilizing agent and a preservative, see the conditioner base disclosed at col. 5, line 44 to col. 6, line 8. For polyethylene glycol ethers of fatty alcohols and polysorbates as solubilizing agents see col. 5, lines 60-67. For the viscosity of the base compositions within the instantly claimed viscosity ranges see col. 3, lines 3-4, col. 5, lines 36-37, and col. 7, lines 58-59. For DMDM hydration and polyaminocarboxylic acid chelates (EDTA), see col. 13, lines 45-58, 66-67, Examples 9, 13, 14 and tables 16-21 at col. 17-23. The final composition may be prepared as a hair salon (at retail location) see col. 2, lines 34-36. The composition is packaged in containers (col. 13, lines 31-34). Rath also teaches various composition containing various performance agents in varying amounts. See, col. 4, lines 28-30 and col. 9, line 26 to col. 13, line 5. Varying the amounts of the active agents is considered equivalent to provide a plurality of intensity levels as herein claimed. Several addition types of performance agents are disclosed. See, particularly, examples 8-15.

Rath does not teach expressly that the vehicles of each performance agent have at least two or three ingredients in common, a blank composition, a label identifying the components of the formulation, that the fragrance contain a solvent and at least one preservative in common, a label with code, a machine scannable bar code, the volume of the container, or the angle of the container' major axis during agitation.

However, it would have been prima facie obvious to a person of ordinary skill in the art, at the time the claimed the invention was made, to employ the same vehicles (such as solvent, preservative etc.) for each of the performance agents (e.g., colorant, fragrance,), since Rath teaches that each of the composition may contain the same components such as water, alcohols and preservatives. Rath would have made obvious to a person of ordinary skill in the art a hair

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care system comprising a plurality of base compositions (e.g., shampoo base and conditioner base), a thickener, and a plurality of performance agents selected from at least two classes of performance agents (e.g., the two herbal additive compositions in columns 19-20 and two or more of the color concentrates in columns 20-23). According to Rath's disclosure, the user would select the desired additives, such as fragrance, colorant, vitamins etc., combine them with the appropriate base (shampoo base for making shampoo, conditioner base for making conditioner) and mix, then add thickener and mix again. The system and method made obvious by Rath meets all of the limitations of instant claim 1.

Further, Stewart teaches a system and a method of preparing a customized, point-of-sale cosmetic composition. The method provide a base composition, and at least one of additives, each additive comprise plurality of variants. Commonly used additives include pH adjusters, oils, drying agents, anti-dandruff agents, salts, colors, fragrances moisturizers, gloss agents, etc. See, particularly, the abstract, pages 22-25 and the claims.

It is within the skill of artisan to add an inert solvent or diluents to a cosmetic composition to dilute the composition in order to achieve the desired strength or level of activity of the composition. Therefore, absent evidence of unexpected results, the addition of a blank composition having common ingredients with the performance agents is not considered critical. The volume of the container is not considered critical to the invention absent evidence to the contrary because it is within the skill of the artisan to select a container capable of holding an appropriate amount of composition. It is within the skill of artisan to adjust the angle of container during agitation to achieve the desired mixing, absent evidence to the contrary.

It also would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to employ more than one variable performance agents, including fragrance, colors, or benefit agents such as vitamins, antidandruff agent, in a customized composition as suggested by Stewart.

The negative limitation excluding thickener from the “performance agents” fails to distinct the claimed invention from the method suggested by Rath. As indicated by the Board, “Even if Rath's thickener is considered a part of the base and not an enhancing additive, the method suggested by Rath meets all of the limitations of instant claim 1.” Particularly, Rath suggest a method of making shampoo or conditioner composition by mixing a base composition with additional active agents (or performance agents), such as fragrance, colorant, vitamin, herbal extract, etc.

Claims 6, 20 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rath et al. (US 5,972,322, of record), in view of Stewart (WO98/30189, of record) for reasons set forth above, and in further view of Rigg et al. (US 5,622,692, of record).

Rath et al. and Stewart as whole do not teach expressly the bar code in the containers.

However, Rigg et al. teaches providing a customized cosmetic composition in a container having a bar code label for identifying the customized composition. See, particularly, col. 2, lines 55-67, col. 4, lines 16-63.

Therefore, it would have been prima facie obvious to one of ordinary skill in the art at the time of the invention was made to prepare the composition of Rath using similar vehicle in a container with a bar code label as taught by Rigg et al. with the reasonable expectation of

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obtaining compatibility of the separate components for specialized treatment composition that can be identified for future use.

Claim 23 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rath et al. (US 5,972,322, of record), in view of Rigg et al. (US 5,622,692, of record) and Stewart (WO98/30189), and in further view of Tartaglione (US 4,851,062, of record).

Rath et al., Rigg et al. and Stewart teaches or suggests all the limitation of the claims as stated above. They do not teach expressly a container with a neck, a plug inserted in the neck and a cap, or container with a neck and a cap without an orifice.

However, Tartaglione teaches a container for packaging cosmetic composition that has a neck and a cap wherein the neck may be closed with a plug. See the abstract, column 1, lines 10-14, column 3, lines 39-41, 50-65 and column 4, lines 30-35.

Therefore it would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to provide the composition as suggested by Rath et al., Rigg et al. and Stewart in a container with a plug and a cap as taught by Tartaglione expecting to provide cosmetic composition in containers with safety closure for preventing contamination of the contents.

(10) Response to Argument

The negative limitation “wherein said first and second class of performance agents do not include a thickener component other than component(s) selected from botanical extracts, emollients, vegetable oils, active agents for treating or preventing skin disorders, vitamins, fragrances and colorants.” Fails to distinct the claimed invention from the system suggested by

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Rath. As indicated by the Board, "Even if Rath's thickener is considered a part of the base and not an enhancing additive, the method suggested by Rath meets all of the limitations of instant claim 1." Particularly, Rath suggest a method of making shampoo or conditioner composition by mixing a base composition with additional active agents (or performance agents), such as fragrance, colorant, vitamin, herbal extract, etc.

Appellants further argue that Rath teaches pre-package by a person other than the consumer, contrasting from what is claimed here. The arguments are untenable. The pre-package disclosed by Rath is to supply separated packages of the components, thereby provide the consumer with multiple options, and do not limit consumer's ability to make choice. In fact, Rath teaches that the base, thickener, and additive components are provided separately, together with instructions (col. 13, lines 31-35). "The instructions can provide one or more formulations of the components, including combinations of the base with the thickener and desired enhancing additives, to achieve a desired shampoo, conditioner or styling composition." Col. 13, lines 36-40. "(T)he base . . . is combined with the desired enhancing additives. The ingredients are typically mixed together by vigorous shaking. . . . A predetermined amount of thickener is then added to the low viscosity mixture, (and) the mixture is vigorously shaken to provide a homogeneous mixture." Col. 13, lines 53-60. Therefore, Rath clearly suggest the idea of giving consumer more choices as to the active ingredients in the shampoo.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge

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generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the teaching, suggestion, and motivation are found in the cited references, and in the knowledge generally available to one of ordinary skill in the art. Particularly, Both Rath and Stewart teach the general idea that let the consumers have more control with respect to the active ingredients (such as fragrance, colorants, bioactive ingredients, etc) in cosmetic composition. Therefore, considering the cited references as a whole, the claimed invention, which allow the customer to chose active ingredients in cosmetic products would have been obvious to one or ordinary skill in the art.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Shengjun Wang

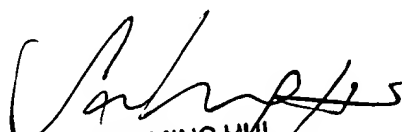

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